86-640 (1)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GENEVA HARRIS, as Personal Representative of the Estate of Doretha a/k/a Dorothea Rolle, Deceased,

Petitioner,

-versus-

THE CITY OF MIAMI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

City of Miami v. Harris, 490 So.2d 69 (3d DCA 1985)

DONALD FELDMAN
FELDMAN & LEVY, P.A.
Counsel for the Petitioner, GENEVA HARRIS, etc.
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305)374-0007

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SUPREME COURT OF THE UNITED STATES

GENEVA HARRIS, as Personal Representative of the Estate of Doretha a/k/a Dorothea Rolle, Deceased,

Petitioner,

-versus-

THE CITY OF MIAMI,

Respondent.

QUESTIONS PRESENTED

I. DOES SECTION 1983 MUNICIPAL LIABILITY ATTACH WHEN A DULY PROMULGATED, WRITTEN MUNICIPAL POLICY IS "INADEQUATE", CHARACTERIZED AS ONE "OF RECKLESS DISREGARD FOR HUMAN LIFE", AND "BECAUSE OF THIS POLICY" AN "INNOCENT PERSON WAS PLACED IN OBVIOUS JEOPARDY "AND KILLED, OR IS IT ALSO NECESSARY TO PROVE THAT . . . "IN ESTABLISHING THIS POLICY THE CITY POLICYMAKERS ACTED MORE THAN NEGLIGENTLY"?

IA. DOES DANIELS V. WILLIAMS, 474 U.S._____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) REQUIRE THAT THE STATE OF MIND OF THE POLICY MAKERS BE PROVEN AT THE TIME THEY ENACTED THE WRITTEN POLICY IN ORDER FOR MUNICIPAL LIABILITY TO ATTACH FOR ACTIONS TAKEN PURSUANT TO AND IN ACCORDANCE WITH ("MANDATED BY") THE POLICY?

II. DOES SECTION 1983 MUNICIPAL POLICY LIABILITY ATTACH WHEN A DULY PROMULGATED, WRITTEN POLICY OF POLICE PROCEDURE WITH "EXPRESS RULES AND REGULATIONS" IS "INADEQUATE", CHARACTERIZED "AS ONE OF RECKLESS DISREGARD FOR HUMAN LIFE", AND "BECAUSE OF THIS POLICY" AN "INNOCENT PERSON WAS PLACED IN OBVIOUS JEOPARDY AND KILLED" OR, IS IT ALSO NECESSARY TO SHOW THAT THERE WAS "A DELIBERATE CHOICE TO FOLLOW A COURSE OF ACTION" "MADE FROM VARIOUS ALTERNATIVES BY THE OFFICIAL OR OFFICIALS RESPONSIBLE FOR ESTABLISHING FINAL POLICY WITH RESPECT TO THE SUBJECT MATTER IN QUESTION"?

IIA. IS THAT WHICH FOLLOWS THE "ALSO" A REDUNDANCY IN QUESTION II ABOVE??

IIB. DOES PEMBAUR V. CINCINNATI, ___U.S.___ 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) IMPOSE A STATE OF MIND REQUIREMENT TO BE APPLIED IN A CONTEXT OF WRITTEN AND FORMALIZED MUNICIPAL POLICY CONTAINING EXPRESS RULES AND REGULATIONS SUCH THAT IT IS NECESSARY TO KNOW WHAT THE POLICY MAKERS CHOSE FROM AND CONSIDERED IN ORDER TO BE ABLE TO STATE THAT THE FINAL POLICY "WAS A DELIBERATE CHOICE . . . MADE FROM AMONG VARIOUS ALTERNATIVES"?

III. IN THE CONTEXT OF MUNICIPAL LIABILITY FOR DEATH OF AN INNOCENT BYSTANDER FROM POLICE ACTION MANDATED AS A RESULT OF A DULY FORMALIZED, WRITTEN POLICE POLICY, WHICH IS A "POLICY OF RECKLESS DISREGARD FOR HUMAN LIFE", IS IT NECESSARY FOR MUNICIPAL LIABILITY TO ATTACH TO PROVE BOTH THAT:

A. THE POLICY MAKERS ACTED MORE THAN NEGLIGENTLY, AND

B. THE POLICY MAKERS DELIBERATELY CHOSE THE POLICY FROM VARIOUS OTHER ALTERNATIVES.

IV. WHEN A MUNICIPAL POLICY MANDATES THE USE OF IMPERMISSIBLE EXCESSIVE (DEADLY) FORCE IN EFFECTUATING THE ARREST OF A FLEEING UNARMED FELON, SUCH THAT DANGER TO INNOCENT THIRD PARTIES IS RECKLESSLY DISREGARDED AND SUCH POLICY CAUSES DEATH TO AN INNOCENT PARTY, IS MORE NECESSARY FOR MUNICIPAL LIABILITY TO ATTACH?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHERS

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GENEVA HARRIS, as Personal Representative of the Estate of Doretha a/k/a Dorothea Rolle, Deceased,

Petitioner,

-versus-

THE CITY OF MIAMI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

OPINIONS OF THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

The Court below issued three opinions in this matter. The first of these opinions upheld a jury verdict in favor of Petitioner on her claim based upon 42

U.S.C. Section 1983. The opinion On Rehearing reversed the Court's prior decision on Petitioner's Section 1983 claim, and remanded the cause for a new trial on that count. In the final opinion, On Second Motion for Rehearing, the Court espoused a new reason for adhering to its prior opinion On Rehearing.

All of these opinions may be found at City of Miami v. Harris, 490 So.2d 69 (Fla. 3d DCA 1985). Petitioner has also reproduced the original opinions of the Third District Court of Appeal in the Appendix (A. 1-37).

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioner seeks review of the opinion on Second Rehearing of the Third District Court of Appeal of Florida which was entered on June 3, 1986. In conjunction therewith review is sought of the Court's original opinion dated December 17, 1985, and its Opinion On Rehearing dated April 1, 1986. Timely motions to each were filed.

The final opinion denying Petitioner's Motion for Rehearing and/or Clarification and/or Certification to the Florida Supreme Court was entered on July 14, 1986. (A. 1-2).

Because of the limited nature of the jurisdiction of the Florida Supreme Court, the Third District Court of Appeal is the highest court of Florida in which a decision could be had in this matter. The only means available to Petitioner for invoking the jurisdiction of the Florida Supreme Court in this case was to show that the decision of the Third District Court of Appeal was expressly and directly in conflict with the decision of another District Court of Appeal, or of the Supreme Court on the same question of law. Fla. Const. Art. V Section 3 (b)(3); Fla. Stat. Ann. Vol. 26, Const. Art. V. Section 3(b)(3), (Supp. 1986); See also, Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Counsel for Petitioner has diligently and completely researched the law of the State of Florida in an attempt to reveal a case in another District Court of Appeal which is in conflict with any of the opinions of the Third District Court of Appeal. It was counsel for Petitioner's hope that he would uncover a conflict which could form the basis for invoking the jurisdiction of the Florida Supreme Court. Such, however, was not the case. Counsel for Petitioner could find no cases whatsoever which apply the standards set forth in Pembaur v. Cincinnati, _____U.S. _____, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) and Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) either in a similar manner, or in a way in conflict with the opinion of the Third District Court of Appeal.

Petitioner, in an equally fruitless attempt to establish jurisdiction in the Florida Supreme Court, also requested that

the Third District Court of Appeal certify this matter to the Florida Supreme Court as a matter of exceptional importance. (A. 149-172) This request was summarily rejected by said Court. (A. 1-2)

Counsel for Petitioner reasonably and diligently sought to establish legitimate jurisdiction in the Florida Supreme Court, a court of limited jurisdiction. As an officer of that Court, it was and is the undersigned's studied belief that such could not be accomplished.

The undersigned as a member in good standing of the Florida Bar hereby certifies the above to be true and correct.

Donald Feldman

In light of the above, Petitioner now seeks to invoke the discretionary jurisdiction of this Honorable Court

pursuant to the provisions of 28 U.S.C. Section 1257(3).

STATUTE INVOLVED

42 U.S.C. Section 1983

Section 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. INTRODUCTION

Because the initial decision of the Honorable District Court of Appeal of Florida, Third District ("Florida Court") (December 17, 1985) well states the facts of this case, and as the subsequent two decisions of that Court on rehearing directly change the result herein solely on the basis of the Court's preceived change in the law by this Honorable Court (Daniels and Pembaur), liberal quotation to that decision will be employed herein.

It is, we respectfully submit, unwise to argue with or quibble with the factual and procedural statements of the Florida Court as:

1. Whether right or wrong, they form the basis for clearly articulated principles of law, and their perceived change by this Honorable Court. Thus, the legal parameters for Section 1983 liability for municipal policy are formated for expeditious treatment by this Honorable Court.

2. The sole basis of reversal by the Florida Court of the judgment entered on a jury verdict for Plaintiff HARRIS in the trial court, is one of law. Factual and evidentiary issues were resolved by the Florida Court in HARRIS' favor; and

3. If this Honorable Court deems it necessary to examine in depth some aspect of the factual or evidentiary basis of this action, it can, of course, do so at any time. But for us to do so in framing a prima facie reason for this Court to accept certiorari, we deem it unwise.

Thus, save in only two instances we will not implement the actual decision of the Florida Court by a citation to the record below. Thus, two instances of citations will be utilized to satisfy any thought that the underlying havoc wreaked by the policy in question is not substantial enough to merit constitutional status and also to give some human coloring to the otherwise sterile words of

the opinion. These two instances will be set off between (*. . . .*) asterisks to denote them.

The separately bound Appendix hereto contains various pleadings in the Florida Court. They can be utilized, if necessary, to document record pages and substantiate that all of that argued herein was properly before the Florida Court.

B. FACTS

GENEVA HARRIS brought a wrongful death action in the Circuit Court for Dade County ("trial court") on behalf of herself, the Estate of her daughter, Doretha Rolle, and her three minor grandchildren who were the children of Doretha.

(*Doretha Rolle lived in the Ghetto with her three children. She was 32 years of age and worked as a cook at the Dorsey Skills Center in order to support her three children. Glendora was 17, Aaron 12 and Derrick 13 years of age at the time of her accident (T 523 and T 524). Mrs. Geneva

Harris, 50 years old, Doretha's mother, was dependent in part upon her for support because of an inability to engage in full time employment due to physical infirmities.*) The action was brought against THE CITY OF MIAMI for negligence under Florida state law and for violation of 42 U.S.C.A. Section 1983. The Section 1983 count was predicated upon an express policy of THE CITY OF MIAMI regarding police chases.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> Geneva Harris, Mrs. Rolle's mother and personal representative, brought an action against the City on behalf of the estate and Mrs. Rolle's three minor children, alleging that the City's police officers were negligent and, in a separate count brought under the authority of Title 42 United States Code, Section 1983, that the City's unreasonable policy in regard to pursuit of law violators deprived Mrs. Rolle of her constitutionally guaranteed rights. (Footnotes omitted)
> (A. 19-20)

The facts of the chase and its consequences are fairly straight forward.

(*Doretha Rolle was seated on a bus bench in Liberty City on Northwest 17th Avenue and Northwest 58th Street. It was Sunday evening, April 27, 1980. Approximately twenty to twenty-five minutes before, one Tyrone Grant Rolle, of no relation to Doretha, had just committed a burglary of some shirts and cigarettes at a J. C. Penny Store at Northeast 79th Street and Biscayne Boulevard (T 149).

A high speed police chase involving every police vehicle in the Northern sector of the City ensued with gun shots being fired at the pursuee (T 224).

The undisputed facts of the chase are that it was high speed (up to 70 m.p.h.) (T 155). The felon's vehicle did not have its lights on (T 150), went through red lights and stop signs, and just missed hitting vehicles (T 155). An attempt was made to block the road with a police

vehicle, which only caused accelerated speed and driving on the sidewalk (T 664-666).

The vehicle ran through the front yard of a house, and ran into a police vehicle or it was thought that he was going to ram somebody (T 173). There was no supervision of the chase, and supervision would have helped (T 177, 199, 200, and 219). Coordination was virtually nonexistent (T 174), even though every unit of the Northern half of the City of Miami Police Department was involved in the chase (T 554).

The police cars were playing "DODGEM". (T 639-641).

Officer Crowley testified that the area toward the end of the chase was congested with police and other vehicles (T 168).

Colonel Witt testified that the area was congested with people. (T 739).

Finally, the police rammed the robber's vehicle, locked fenders, and forced him off

the road into and over Doretha Rolle. She was dragged underneath the offender's vehicle for approximately a block and during such time, she suffered severe, painful, and eventually death producing burns.

Before she died, however, Doretha Rolle was hospitalized at the University of Miami Burn Center, Jackson Memorial Hospital, and she lingered through nineteen horrendous days before she expired (T 469). During that course of time, she had to undergo a partial mastectomy and a complete mastectomy. "Her breasts were burned so badly that we actually had to remove them." (T 473). It is unnecessary to describe in detail what this hospitalization was like and what the family saw and what their reaction to it was. It was anything but a de minimis situation.*)

ORIGINAL OPINION OF FLORIDA COURT

(December 17, 1985)

* * *

> When police officers of the City of Miami, in high-speed pursuit of a vehicle being driven by a suspected burglar down a congested street, rammed the fleeing suspect's car, locked fenders with it, and forced it off the road into a bus bench on which Mrs. Doretha Rolle was sitting, Mrs. Rolle was killed.
> (Emphasis supplied)
> (A. 19)
>
> * * *
>
> . . . The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle--was actually killed.
> (Emphasis supplied)
> (A. 24)

The state law count for respondeat superior liability of the CITY for the negligent actions of its police officers was tried with the Section 1983 count for direct liability of the CITY for its inadequate policy. The jury found for the Plaintiffs on both counts and assessed total damages in the sum of $595,000. Attorneys' fees under 42 U.S.C. Section

1988 in the sum of $100,000. were thereafter awarded by the Court.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> A jury returned a verdict for the plaintiffs, finding that the negligence of its officers (for which the City was responsible through the doctrine of respondeat superior) and the City's "inadequate policy in regard to police chases" both were the legal causes of Mrs. Rolle's death. The jury awarded the plaintiffs a total of $595,000 in damages, but was not asked to and did not allocate the damages to one or the other of the causes of action. The trial court entered judgment on the verdict and, after separate hearing, awarded the plaintiffs' attorneys $100,000 in fees under the authority of Title 42 United States Code, Section 1988, which, inter alia, authorizes the award of attorneys' fees to parties prevailing under Section 1983. (Footnotes omitted)
> (A. 20)

Because Florida law restricts the amount of the damages recoverable against a municipality and attorney's fees are not awardable thereunder, the Section 1983 count became of paramount importance.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> 3/ This court must reach the question of the City's liability under Section 1983 regardless of the resolution of the common law negligence count because (a) attorneys' fees may be awarded under the Section 1983 count but not under the common law negligence count, and (b) the City implicitly concedes that the monetary limits of the City's liability set forth in the waiver of sovereign immunity statute, see Section 768.28(5), Fla.Stat. (1983),[?] clearly applicable to the common law negligence count, do not serve to reduce any recovery under the Section 1983 count.
> (Question mark supplied as accident and death took place in 1980) (A. 35)

C. CHARACTERIZATION OF THE POLICY

1. The Florida Court clearly recognized that this was a case which was governed by an existent City policy, and that proof of a policy by custom, practice or by single act was not necessary.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> 5/ Because the existence of the City's policy relating to high-speed chases is proved by an express rule and regulation, we need not concern ourselves with the question whether evidence of an incident combined with subsequent non-action by the City would be sufficient to prove circumstantially the existence of the policy. See Oklahoma City v. Tuttle, _____ U.S. _____, 105 S.Ct. 2427, 85 L.Ed.2d 791. (Emphasis supplied) (A. 35-36)

This expressly formulated policy of the CITY OF MIAMI:

(a) Mandated that the police officers pursue fleeing suspects until apprehension.

ORIGINAL DECISION OF FLORIDA COURT
(December 17, 1985)

* * *

> In the present case, the evidence showed that the City of Miami had in effect at the time of Mrs. Rolle's death express rules and regulations that (a) mandated that its police officers on pain of disciplinary action against them, pursue fleeing suspects until apprehension, and (b) failed to provide for the abandonment of the pursuit when in the judgment of the officer the continuation of the pursuit would involve a significant risk of injury or death for innocent members of the

public or the officer. (Emphasis supplied) (Footnotes omitted) (A. 23)

(b) Mandated the use of deadly force which threatened the lives of innocent persons such as herein.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties. Moreover, the City's policy provided that an officer who failed to continue pursuit until apprehension would be disciplined. The police officers thus knew when they acted that their use of deadly force in the form of a speeding vehicle which threatened the rights and safety of innocent persons would meet with the approval of, and indeed was required by, the City policymakers. (Emphasis supplied) (A. 25-26)

(c) Was characterized as one of reckless disregard for human life.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> That a policy of reckless disregard for human life is sufficient to sustain a Section 1983 action is clear from Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985). (Emphasis supplied) (A. 24)

(d) Caused the death of Plaintiff's decedent, DORETHA ROLLE.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> . . . The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle-- was actually killed. (Emphasis supplied) (A. 24)

D. THE ORIGINAL OPINION: RATIO DECIDENDI

The original opinion of the Florida Court applied the principles of liability for municipalities in a rather straight forward manner. The traditional Monell approach (Monell v. Department of Social

Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) was utilized -- policy being the moving force of the deprivation.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> Both parties agree that essential to recovery in a Section 1983 action against a municipality is a showing that the alleged constitutional deprivation flowed from an official policy or custom was "the moving force of the constitutional violation." Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). (Footnotes omitted)
> (A. 22)

After analysis of the CITY OF MIAMI policy, as hereinbefore set forth, as one of reckless disregard for innocent lives and which caused the death herein, the judgment of the trial court was affirmed in all respects material to this petition.

B. THE FIRST REHEARING: 180 DEGREE TURN
(Daniels v. Williams, 474 U.S._____. 106 S.Ct. 662 88 L.Ed.2d 662 (1986)

While the case was pending in the Florida Court on the CITY OF MIAMI'S rehearing motions directed to the original opinion of December 17, 1985, This Honorable Court decided Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Without giving your Petitioner, HARRIS, an opportunity to address Daniels, the Florida Court granted rehearing, receded from its original opinion, and remanded the case for a new trial on what it perceived to be the new standards required by Daniels. The pertinent parts of the Florida Court's Opinion On Rehearing are as follows:

FLORIDA COURT'S FIRST REHEARING OPINION
(April 1, 1986)

* * *

> In the month following the release of our opinion in this case, and while the appellant's timely-filed motion for rehearing pended, the United States Supreme Court, overruling its prior contrary holding, - decided that mere negligence by a state

official can no longer be said to "deprive" an individual of life, liberty or property under the Fourteenth Amendment and thus support a claim for relief under Title 42, United States Code, Section 1983. See Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). (Footnotes omitted)
(A. 9)

* * *

The verdict for the plaintiffs below, following instructions that required the jury to consider whether the policy of the City in regard to police chases was adequate or inadequate, determined that the City's policy was "inadequate." The jury was not asked to consider, and the plaintiffs were not called upon to prove, whether in establishing this official policy the City acted more than negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a "reckless disregard" of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient.

As we noted in our initial opinion, the jury awarded the plaintiffs a total of $595,000 in damages, but was not asked to and

> did not allocate the damages to either the common-law negligence or the Section 1983 count of the complaint. So long as the Section 1983 action was affirmable (and until Daniels it was), . . . (Emphasis supplied) (A. 10-11)

A Motion to Vacate Order on Rehearing, etc., was filed because it was believed that the Court's opinion was not only wrongly decided, but it was formulated without Appellee/HARRIS having had any chance for an input on the effect of Daniels on her case. (A. 42-68) This Motion was denied. (A. 6-7).

F. THE HARRIS REHEARING MOTION

A timely Motion for Rehearing was filed by HARRIS which attempted to demonstrate that:

1. The Opinion on Rehearing was ambiguous, but that, in any event, it appeared to create a state of mind requirement for municipal policymakers.

HARRIS' MOTION FOR REHEARING, ETC.
(April 24, 1986)

* * *

> One of the very real problems generated by this Honorable Court's Opinion on Rehearing is an ambiguous measuring rod for municipal liability. Is this Honorable Court holding that the state of mind of the policy-makers is the test to be applied or is it holding that the standard is the import of the policy itself?
>
> We respectfully submit that this problem is not addressed by this Honorable Court and the language of the Opinion itself engenders confusion.
> (A. 111-112))

2. The Opinion On Rehearing, by including a state of mind requirement, violated the teachings of Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) as it related to municipal liability for policy.

HARRIS' MOTION FOR REHEARING, ETC.
(April 24, 1986)

* * *

> The fundamental question in a Section 1983 suit grounded on municipal policy, as opposed to one based on a state employee's/ random, individual actions, is whether or not an authorized policy, when executed, results in loss of constitutional rights. See, e.g. Pembaur, supra; Monell, supra. It is this hallmark dis-

> tinction between individual and municipal liability which lies at the heart of the decision in Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), wherein the Supreme Court would not grant a municipality any type of immunity in a Section 1983 suit, even though its individual officials may very well be cloaked with immunity when they act reasonably or in good faith.
> (A. 114-115)
>
> * * *
>
> The difference between suits against individuals in their personal capacity and suits against those individuals in their official capacity (governmental policy suits) is strikingly reaffirmed in Brandon v. Holt, _____ U.S. _____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); and Kentucky v. Graham, 473 U.S. ____, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).
> (Emphasis in original)
> (A. 117)

3. The Daniels case applied to random, unauthorized acts and did not apply to measure liability pursuant to officially formulated municipal policy.

HARRIS' MOTION FOR REHEARING, ETC.
(April 24, 1986)

* * *

> Daniels v. Williams, deals exclusively with a random and unauthorized act, that is, Section 1983 individual liability due to the negligent act of placing pillows on a staircase. It does not in any manner address or affect the contours of municipal liability under Section 1983, which is set into motion whenever a policy is "the moving force behind a Constitutional violation". Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). The Monell principle, aptly relied upon by this Court in its original opinion, has been in no way modified or overruled by Daniels, supra, because they each deal with different types of Section 1983 claims.
> (Emphasis in original)
> (A. 98-99)

4. Pembaur v. City of Cincinnati, ___ U.S._____, 106 S.Ct. 1292, 89 L.Ed.2d 452, (1986) [54 L.W. 4290 (March 25, 1986)], which was decided at about the time the Florida Court was writing its Rehearing opinion, was totally inconsistent with the Florida Court's treatment of Daniels. As the municipal policymaker in Pembaur was acting in good faith and without

negligence, there would be no county liability under the state of mind test attributed to Daniels, in policy cases, by the Florida Court. Yet, of course, it was pointed out that liability was found by this Honorable Court.

HARRIS' MOTION FOR REHEARING, ETC.
(April 24, 1986)

* * *

D. Pembaur v. City of Cincinnati, ___ U.S. ____, 54 L.W. 4290 (March 25, 1986)

In Pembaur v. City of Cincinnati, supra, the Supreme Court found municipal liability to attach to an official county policy which was promulgated by a high County official, a County prosecutor, who authorized a forcible entry into plaintiff's place of business. At the time that the entry was carried out, this particular type of police conduct was permitted under Constitutional law. Prior to Supreme Court review of this Section 1983 action, the law governing forcible entry was changed. In addressing plaintiff's Section 1983 civil damage suit, the Supreme Court was only interested in whether the policy inflicted an injury or caused a Constitutional deprivation, and because it did, the state of mind or "wrongfulness" of the policy-maker would not be considered. In its decision on rehearing,

> this Honorable Court suggests that Daniels v. Williams, supra, calls for an examination of the policymakers' conduct. Clearly, if Daniels was intended to have this effect, the Pembaur Court would have been obliged to dismiss plaintiff's action because it is clear that the policymaker, by making policy in accordance with the law of forcible entry as it then existed, did not act negligently, recklessly or willfully. (Rightously [sic] if anything!)
>
> It is most notable in Pembaur, supra, that there was indeed individual action, but such action, because done by a policymaker was also considered to be county policy. The standards for governmental liability were applied by the United States Supreme Court, not that of an individual's liability for random, unauthorized acts. (Emphasis in original and supplied)
> (A. 117-119)

G. THE SECOND REHEARING: (WITHOUT "DEBATING" DANIELS - BUT BASED ON "STILL MORE RECENTLY DECIDED" PEMBAUR)

The Florida Court concisely stated your Petitioner/HARRIS' argument regarding the misapplication of Daniels but chose not to "debate" it.

THE FLORIDA COURT'S SECOND REHEARING OPINION

(June 3, 1986)

> This second opinion on rehearing is in response to the motion of the plaintiffs-appellees. They complain that in the first rehearing (sought by the defendant-city) we changed from affirming to reversing the Section 1983 judgment for the plaintiffs in erroneous reliance on the subsequently decided Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), which, they argue, applies to cases involving the liability of individuals only, not to cases, as here, involving the liability of municipalities based on municipal policy. Without now debating the merits of the plaintiffs' argument, . . .
> (Emphasis supplied)
> (A. 4)

The Florida Court then immediately turned to Pembaur to justify its "On Rehearing" remand for a new trial.

THE FLORIDA COURT'S SECOND REHEARING OPINION
(June 3,, 1986)

* * *

> . . .[W]e note that in the still more recently decided case of Pembaur v. Cincinnati, ____ U.S. _____, _____, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452, 465 (1986), a plurality of the Court held "that municipal liability under Section 1983 attaches where--and only where-- deliberate choice to

> follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." There being no such proof adduced by the plaintiffs, the judgment in their favor must be reversed. However, because this failure of proof is attributable to the plaintiffs' having proved only that required by the law at the time of trial, they will have an opportunity to supply the missing proof upon a retrial of the case. With this clarification, we adhere to our opinion on rehearing filed in this cause on April 1, 1986.
> (Emphasis supplied)
> (A. 4-5)

HARRIS, frankly, exasperated at being told that she could have prevailed before Pembaur, but not after, filed her authorized Motions for Rehearing to this opinion.

An attempt was made to show:

1. That Pembaur was not concerned with adding a state of mind requirement to cases where municipal policy was clearly evidenced by express rules and regulations;

2. That the phrase "a deliberate choice to follow a course of action made

from various alternatives" was used to determine if a policy was in fact made on one particular occasion for one particular purpose by one high ranking official; and

3. The state of mind inquiry would, in any event be pretermitted by Owen v. City of Independence, supra, Kentucky v. Graham, 473 U.S. ____, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and Brandon v. Holt, _____, U.S._____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985).

HARRIS' SECOND MOTION FOR REHEARING
(June 10, 1986)

* * *

> It is virtually impossible to write that which follows because we truly and humbly submit that it should never need be written.
>
> In this regard the Panel of this Honorable Court has previously held that the policy of The City of Miami in regard to police chase was established by express rules and regulations.

* * *

> This was similarly the case in Monell. Is it to be imagined that Pembaur would now require Mrs. Monell, if decided today, to

show that "a deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question"?

It is submitted that the existence of the written policies and procedures in Monell, which were designed to apply in all instances, would make such an inquiry meaningless.

* * *

We are now back into the prohibited state of mind inquiry pretermitted by Owen vs. City of Independence; Brandon vs. Holt; and Kentucky vs. Graham.

* * *

The Pembaur majority then extends Monell; expanding its contours for liability to singular decisions by single individuals (an expressed rule or regulation was absent).

* * *

We respectfully submit that to take Pembaur, which is probably the single most expansive decision on municipal liability since Monell and Owens, written by the Justice who is consistently the most vocal and consistent advocate of expanding the contours of municipal liability, and turn it into a small noose to choke off municipal culpability -- would suggest that which

follows.

V
Justice Must Have The Appearance Of Justice (Not a "Debate"). (Emphasis in original) (A. 157-163)

H. THE FINAL OPINION (July 14, 1986)

By Order dated July 14, 1986, The Florida Court denied HARRIS' Second Rehearing Motion, and declined to certify the matter to the Supreme Court of Florida. (A. 1-3)

REASONS FOR GRANTING CERTIORARI

It is respectfully prayed that this Honorable Court grant certiorari herein for the following reasons:

A. GENERALLY

I. The easiest stated reason for this Honorable Court granting certiorari is that the decision of the Florida Court wrongly construes an important Federal Statute, clearly and directly;

II. The decision of the Florida Court is in direct conflict with this Honorable

Court's decisions in numerous cases, including Monell, Hudson, Zimmerman, Parratt, Daniels, Owen, Brandon, Garner and Kentucky v. Graham. It is also in conflict with a multiple number of decisions by the United States Courts of Appeals;

III. The underlying factual patterns of Parratt and Daniels were the weakest for establishing Section 1983 liability. Certiorari was granted in those cases and the law was written in such a fashion as to emphasize the need of not trivializing Constitutional torts.

The case sub judice is anything but trivial, and can readily be used to demonstrate the inapplicability of Parratt and Daniels to such a clear instance of inadequate municipal policy. Here the policy of the CITY OF MIAMI was inadequate to protect the rights of innocent persons during regularly occurring police procedures; and

IV. If allowed to stand as written and given the added imprimatur of a cert. denied in its citation, (legally of no moment, but pragmatically of great) the opinion of The Florida Court will virtually eliminate any semblance of municipal liability where duly enacted express rules and regulations are the moving force of a deprivation of life, liberty, or property.

THE STATE OF MIND OF POLICYMAKERS HAS NOTHING TO DO WITH MUNICIPAL LIABILITY -- IT ONLY ALLAYS FEARS OF AN INCHMEAL DEMISE OF THE CIVIL RIGHTS ACT BY FINISHING IT AT ONCE.

Referring to the excerpts from the opinions on rehearings above cited, it is respectfully suggested that the attempt by the Florida Court to require measurement the state of mind of the policymakers as they promulgate a policy in question, was never intended by this Honorable Court. In addition, any such requirement would signal the virtual demise of the Civil Rights Act. Such state of mind could hardly ever be the subject of available proof.

B. SPECIFICALLY

1. PEMBAUR

It would serve no useful purpose, we respectfully submit, to address how the Florida Court was wrong in holding that GENEVA HARRIS could have recovered under the law as it existed before Pembaur, but, not after. To suggest, much less hold, that a state of mind requirement was engrafted by Pembaur onto Section 1983 where there is express, written policy -- to fathom what the policymakers were deliberately choosing from -- is, at best, wrong.

2. THE BASIC CORE CONCEPT COMMON TO MOST 1983 ISSUES -- WHICH SHOULD BE CLEARLY ARTICULATED.

Section 1983 Law, obviously, reflects a compromise of individual rights and the necessity of governmental actiion. This synthesis is tempered by a conscious and articulated desire not to trivialize the Constitution.

This formulation is implicit and explicit in the ratio decidendi of Daniels.

Daniels v. Williams,
474 U.S. _____, 106 S.Ct. 662,
88 L.Ed.2d 666 (1986)

* * *

> . . .Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power." Id., at 548-549, 101 S.Ct., at 1919-1920; see also id., at 545, 101 S.Ct., at 1917 (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). Upon reflection, we agree and overrule Parratt to the extent that it states that mere lack of due care by a state official may "deprive" an individual of life, liberty or property under the Fourteenth Amendment. (106 S.Ct. at 664-665)

The word "deprive", as a matter of pure grammatical construction, could have been given the interpretation as was articulated in Daniels by Justice Stephens at 106 S.Ct. 680. After all, the syntax

per se of the Constitutional provision does not dictate that "deprive" refer to the actions of the actor, rather than on the harm to the recipient. The majority of the Court chose to adopt the approach of looking more to the actions of the potential depriver. The reason, apparently one of policy -- not to trivialize the Constitution.

Because of this, we respectfully submit that there are two principles which permeate the law and basically transcend other considerations.

(a) When the government acts through agents following pre-established, well defined policy and procedure and such procedures are inadequate to protect the constitutional rights to life, liberty or property, liablity should lie.

ORIGINAL OPINION OF FLORIDA COURT
(December 17, 1985)

* * *

> A finding of a policy or custom is necessary because it shows that the violation was "neither

> random nor unauthorized, but wholly predictable, authorized and within the power of the [City] to control." Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc). (Emphasis supplied) (A. 22)

The rationale of holding a city liable when action is pursuant to its procedures is that the city has the time and the resources to draw proper and adequate safeguards. It is not random conduct, but the full power of the city, which could be fully withheld, that is brought to bear on the individual. Liability, therefore, would in no sense be a trivializing of the Constitution.

> Daniels v. Williams, 474 U.S. _____, 106 S.Ct. 662 88 L.Ed.2d 662 (1986)
>
> * * *
>
> ("The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889)."); Parratt, supra, 541 U.S., at 549, 101 S.Ct., at 1920 (POWELL, J., concurring in result). By requiring the government to follow

> appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., Rochin, supra, it serves to prevent governmental power from being "used for purposes of oppression," Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U.S.) 272, 277, 15 L.Ed. 372 (1856) (discussing Due Process Clause of Fifth Amendment).
> (Emphasis supplied)
> (106 S.Ct. at 665)

We submit that the following is most instructive:

Mann v. City of Tucson Dept. of Police, 782 F.2d 790 (9th Cir. 1986)
(Concurring opinion of Sneed, J.)

* * *

> I suggest that a satisfactory answer would commence with Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Thus, the first portion of the answer would be that the Parratt analysis is irrelevant to section 1983 claims based upon an alleged unconstitutional state law, policy, procedure, pattern, or practice. The basis for this rule would be that the state has forfeited its opportunity under its procedures to pro-

vide an appropriate remedy for wrongs having the state's own imprimatur.
(Emphasis supplied)
(At p. 798);

(b) An "appropriate procedure" or policy, either for "Fourth Amendment seizure" or Constitutional Due Process is one which adequately protects the rights of individuals, espeically "innocent ones".

We respectfully submit that the American Law Institute's Model Penal Code Section 3.07(2)(b) (Proposed Official Draft, 1962) well sets forth the rule.

MODEL PENAL CODE SECTION 3.07(2)(b)
(PROPOSED OFFICIAL DRAFT 1962)

> The use of deadly force is not justifiable . . .unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arres-

> ted will cause death or serious bodily harm if his apprehension is delayed.
> (Emphasis supplied)

For approval of this provision, please see Garner v. Memphis Police Dept., 710 F.2d 240 (6th Cir. 1983) (En Banc), affd., Memphis Police Dept. v. Garner, 471 U.S. ___, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985);

3. DANIELS DOES NOT APPLY TO MUNICIPAL LIABILITY FOR POLICY

Daniels v. Williams, deals exclusively with a random and unauthorized act, that is, Section 1983 individual liability due to the negligent act of placing pillows on a staircase. It does not in any manner address or affect the contours of municipal liability under Section 1983, which is set into motion whenever a policy is "the moving force behind a Constitutional violation". Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). The Monell principle, aptly relied upon by the Florida Court in its original opinion, has been in

no way modified or overruled by Daniels because they each deal with different types of Section 1983 claims.

Parratt v. Taylor makes the seminal distinction between random, unauthorized acts and those done pursuant to State procedure:

> Parratt v.Taylor
> 451 U.S. 527, 543, 101 S.Ct. 1908, 1917, 68 L.Ed.2d 420 (1981)
>
> * * *
>
> [1c] Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate. . . .
> (Emphasis supplied)
> (At 451 U.S. 543, 101 S.Ct. 1917)

Parratt v. Taylor, does not, nor does its progeny, Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed .2d 265 (1982), or Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983), deal with municipal liability. It is, however, possible to extrapolate some very valuable principles from them (which Daniels does not change):

1. There is a substantial difference in the Constitutional sense between actions which are done pursuant to Governmental procedures and those which are not;

2. When Governmental procedures are followed, Governmental liability should then follow when those procedures are inadequate or deficient to protect the individual's Constitutional rights; and

3. The state of mind of the individual actor is important only when established procedure is not followed.

The predecessor for this line of cases was Bonner v. Coughlin, 545 F.2d 565

(7th Cir. 1976) (En Banc). The panel decision was authored by then Judge John Paul Stevens. Subsequent to his leaving that bench, the en banc Court declined to follow his opinion. It is his reasoning, however, which became the ratio decidendi of this Honorable Court.

The distinction between deprivations caused by state procedures and those deprivations caused by actions which are unauthorized, or are in contravention of state regulations, is underscored in another of then Judge Stevens' opinions. The companion case to Bonner, supra, is Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976) (En Banc). The difference between liability for actions pursuant to state procedures and for those not pursuant is underscored therein.

Kimbrough v. O'Neil,
(Panel decision)
523 F.2d 1057 (7th Cir. 1975)
(Concurring opinion of Stevens, J.)

* * *

The focus shifts when we ask

> whether there is sufficient state involvement to justify Section 1983 liability. That question is easily answered when, as in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424, the harmful conduct is expressly authorized by the State. It is more difficult when the agent's action is not so authorized, but his office has placed him in a position to cause a harm which a private citizen might not have an opportunity to perpetrate. Thus in Bonner, the majority of the panel had no doubt that the prison guards who ransacked the cell were acting under color of state law within the meaning of Section 1983. This conclusion would seem equally valid regardless of whether the guards negligently damaged Bonner's property or deliberately appropriated it. Their private motivation would hardly seem controlling on the state action issue.
> (Emphasis supplied)
> (523 F.2d at 1065)

In Logan, it was made clear that Parratt did not apply to deny liability where State procedure was followed:

> Logan v. Zimmerman Brush Company, 455 U.S. 422, 435- 436, 102 S.Ct. 1148, 1158 71 L.Ed.2d 265 (1982)
>
> This argument misses Parratt's point. In Parratt, the Court

> emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." 451 US, at 6 51, 68 L Ed 2d 420, 101 S Ct 1908. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference--whether the Commission's action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. See id., at 545, 68 L Ed 2d 420, 101 S Ct. 1908 (second concurring opinion). Unlike the complainant in Parratt, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.
> (Emphasis supplied)
> (455 U.S. 435-436, 102 S.Ct. 1158).

Please note above how the state of mind is immaterial when it is the policy or procedure that is at issue.

In Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983) negligent and intentional, unauthorized random acts are put on the same footing.

Hudson v. Palmer,
468 U.S. 517, 533
104 S.Ct. 3194, 3302-3303
82 L.Ed.2d 393 (1983)

* * *

> . . . The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

* * *

> . . . For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.
> (Emphasis supplied)
> (At 468 U.S 533, 104 S.Ct. 3302-3303)

Thus, under those cases, random, unauthorized negligent or intentional acts could have been the predicate for individual liability. They could have constituted a "deprivation". It is this and only this aspect of Parratt and Hudson that

is overruled by Daniels. Now, a random, unauthorized act which is negligently committed cannot be a predicate for individual liability (a deprivation), while the intentional act can still form such predicate.

We respectfully submit that our analysis as to the effect of Daniels has recently been given judicial imprimatur in Mann v. City of Tucson Dept of Police, supra.

> Mann v. City of Tucson Dept of Police, 782 F.2d 790 (9th Cir. 1986) (Concurring Opinion of Sneed, J.)
>
> * * *
>
> In sum, Daniels and Davidson overruled that portion, and only that portion, of Parratt v. Taylor that held that a negligent loss of property by state officials acting under color of state law was a "deprivation" of property within the meaning of the Due Process Clause of the Fourteenth Amendment. . . .
>
> . . .Therefore, I must be guided by this court's previously mentioned trilogy in which the rather clear message was "Apply Parratt only to random and unauthorized deprivations of pro-

perty by state prison officers." See Haygood v. Younger, 769 F .2d at 1357.
(Emphasis supplied)
(At p. 799)

Also instructive is King v. Massarweh, 782 F.2d 825 (9th Cir. 1986).

King v. Massarweh,
782 F.2d 825 (9th Cir. 1986)

* * *

. . .The Supreme Court has overruled Parratt v. Taylor's holding that negligent deprivations of property implicate due process interests. Daniels v. Williams, _____ U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d _____ (1986).

Here, the appellants allege that they were deprived of liberty because they were taken into custody for up to two days and because personal property was taken from their apartments. However, there has been no showing that these deprivations occurred as a result of deliberate non-random state processes.
(Emphasis supplied)
(At p. 828)

In sum, Parratt, Logan, Hudson and Daniels are all specifically outside of the area of municipal liability for policy. They are really not necessary,

individually, or in sum, to decide this case.

We respectfully, however, submit that municipal liability as set forth in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) interfaces smoothly and consistently with Parratt, Zimmerman, Hudson and Daniels. This follows because this Honorable Court in Monell, of course, squarely held that a municipality can only be held liable for its policies and not on a respondeat superior basis for the random, unauthorized acts of its employees.

Monell v. Department of Social Services,
436 U.S. 658, 694-695,
98 S.Ct. 2018, 2037-2038,
56 L.Ed.2d 611 (1978)

* * *

> We conclude, therefore, that a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly

> be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see supra, at 660-6 62, and n 2, 56 L Ed 2d, at 616-617, we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under Section 1983 may be. We have attempted only to sketch so much of the Section 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.
> (Emphasis supplied)
> (At 436 U.S. 694-695, 98 S.Ct. 2037-2038)

Therefore as Daniels was not intended, designed, or appropriate to be read into cases dealing with "Monell Policy", The Florida Court clearly misapplied the law.

4. The apparent amalgamation of Pembaur with Daniels by the Florida Court to create a state of mind requirement is pretermitted by Owen v. City of Independence.

In fact, Mrs. Monell would lose under the Florida Court's opinions despite the fact of her proof of a policy that was the moving force of her deprivation. The Florida Court apparently would require Mrs. Monell to prove that: (a) Under that Court's interpretation of Pembaur, the New York policymakers' express policy was actually a "Pembaur policy," one chosen deliberately instead of others ("You must leave work after six months of pregnancy and we did consider three, four, five, seven, and eight months, as well as the possibility of a discretionary review according to your physical condition"); and (b) Under that Court's interpretation of Daniels, the New York policymakers intended to (or more than negligently) deprive her of her rights when they established the policy. Such "confessions" by the lawmakers in New York is extremely unlikely and certainly was not proven by Mrs. Monell.

In this regard: Daniels and Pembaur address completely unrelated issues (random unauthorized acts versus municipal policy) and cannot co-exist to create a new proposition in the same legal arena. To reiterate, the prosecutor in Pembaur acted in the best of faith, relying upon a statute that was only later declared unconstitutional. The sheriff also kicked the door down in the best of faith, following the good faith instructions of the prosecutor. The dissent in Pembaur states that under the majority opinion even "a non-negligent mistake in judgment" by the policymakers is sufficient to establish municipal liability. (106 S.Ct. at 1307, footnote 4).

Under the Florida Court's apparent amalgamation, recovery would be precluded in Pembaur, because under Daniels the prosecutor did not intend to deprive any rights and did not act more than negigently (or even negligently!). Neither did the

sheriff. Yet, with all of this good faith, and to illustrate the logical nullity of combining Daniels and Pembaur, this Honorable Court found municipal liability in Pembaur.

This state of mind requirement is, we respectfully submit, at complete odds with Owen and serves to highlight the different standards for individual liability (random, unauthorized or otherwise) and municipal culpability.

Owen vs. City of Independence
445 U.S. 622, 650-651,
100 S.Ct. 1398, 1415-1416,
63 L.Ed.2d 673 (1980)

* * *

> Our rejection of a construction of Section 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy.
>
> * * *
>
> How "uniquely amiss" it would be, therefore, if the government itself--the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the

> setting of worthy norms and goals for social conduct"--were permitted to disavow liability for the injury it has begotten. See Adickes v. Kress & Co., 398 U.S. 144, 190 (1970) (opinion of BRENNAN, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, see Scheuer v. Rhodes, 416 U.S. 232 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.
> (Emphasis supplied)
> (At 445 U.S. 650-651, 100 S.Ct. 1415-1416)

5. The deadly force policy of the CITY OF MIAMI may well have been unconstitutional per se because it justified HARRIS' seizure by the use of deadly force when both she and the fleeing suspect were unarmed and the use of deadly force was mandated by the City policy.

This would be by way of Fourth Amendment or by Due Process.

A strong argument can be made that GENEVA HARRIS was "seized." Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986); Jamieson v. Shaw, 772 F.2d 1205, (5th Cir. 1985); Pruitt v. City of Montgomery, 771 F.2d 1475 (11th Cir. 1985).

In Memphis Police Department v. Garner, 471 U.S.____ , 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this Honorable Court squarely upheld the United States Court of Appeals determination that the use of force in circumstances such as herein was not permissible. Florida is mentioned in Footnote 14 at 105 S.Ct. 1704 as following the common law rule on deadly force, which was specifically found to be Constitutionally impermissible.

The CITY OF MIAMI adopted state law on the use of firearms and other aspects of deadly force.

Operational Orders City of Miami Police Department

* * *

> In accordance with those laws of the State of Florida and 1971 Op. Attorney General, 071-4 1, March 22, 1971, the MIAMI POLICE DEPARTMENT establishes the following:
>
> a. A police officer has the authority to use deadly force to apprehend a fleeing felon, whether the felon is armed or unarmed, or whether the felony involved is one against a person or one against property.
> . . .

Garner involved the rights of a fleeing felon and not those of an innocent bystander. It was a Section 1983 action by the felon, and the Court of Appeals utilized Fourth Amendment and due process analysis, while this Honorable Court appears to only have considered the Fourth Amendment aspect. It is hard to imagine that the rights of the felon are greater, rather than equal to, or less than, that of an innocent bystander. Therefore, although there may not have been a seizure of the decedent herein within the Fourth Amendment, there is certainly a lack of due

process attendant upon the deprivation of her liberty and the taking of her life, sans process.

Garner vs. Memphis Police Dept., 710 F.2d 240 (6th Cir. 1983) (En Banc)

* * *

> An analysis of the facts of this case under the Due Process Clause of the Fourteenth Amendment leads us to a similar result. That clause prohibits any State from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The right to life, expressly protected by the Constitution, has been recognized repeatedly by the Supreme Court as fundamental in the due process and equal protection contexts.
> (Emphasis supplied)
> (At p. 246)

* * *

> The principles and distinctions we have enunciated here have been cast in the form of a rule by the American Law Institute in the Model Penal Code, a rule which accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons:
>
> The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace

> officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.
> Model Penal Code Section 3.07(2) (b) (Proposed Official Draft, 1962).
> (Emphasis supplied) (At p. 247)

It must be remembered that the full policy of the CITY OF MIAMI, including that on the use of deadly force, was held to be:

(a) one of "reckless disregard for human life" and

(b) one that failed to take into account danger to innocent third parties. It must also be remembered that this policy "mandated" the use of deadly force herein.

CONCLUSION

It is respectfully submitted that the use of "adequate" and "inadequate" are proper nomenclature to describe permissible and impermissible Section 1983 municipal policy parameters.

Bartholomew v. Fischl,
782 F.2d 1148 (3d Cir. 1986)

* * *

> See, e.g., Brandon v. Holt, _____ U.S. _____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985) (reversing finding of no municipal liability where plaintiff showed existence of a policy of police procedures inadequate to discover officer misconduct); Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983) (imposing municipal liability based upon policy requiring that city employees' complaints be passed up "chain of command"); Black v. Stephens, 662 F.2d 181, 191 (3d Cir. 1981) (holding city liable because of policy delaying investigation of complaints of police misconduct until underlying charges against complainant were resolved). . . .
> (Emphasis supplied)
> (At p. 1153)

Please see Trezevant v. City of Tampa, 741 F.2d 336 (11th Cir. 1984); Garris v. Rowland, 678 F.2d 1264 (5th Cir. 1982).

Thus, a finding of the trier of fact that a policy is either adequate or inadequate is a well-recognized and appropriate device by which to measure the policies of governmental bodies. Morever, these terms are neutral as to degrees of care and do not connote "negligence", "willfulness" or any other state of mind, as well they should not.

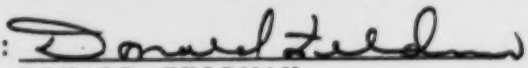
It is respectfully submitted that a policy is either adequate or inadequate to protect the constitutional rights of the individual. This is, of course, a measuring device which balances the governmental activity and the availability and use of safeguards to carry out that activity in light of the public's right to be secure in their persons and property.

It is respectfully prayed that this Honorable Court issue its Writ of

Certiorari to the Florida Court as this case is deserving of full consideration.

Respectfully submitted,

FELDMAN & LEVY, P.A.
Counsel for the Petitioner
GENEVA HARRIS, etc.
Suite 1700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone No. (305)374-0007

BY: 
DONALD FELDMAN

Dated: October 14, 1986

CERTIFICATE OF SERVICE

I, DONALD FELDMAN, being over the age of 18 years, hereby certify that I have this fourteenth day of October, 1986, served three copies of the foregoing Petition For Writ of Certiorari to the District Court of Appeal, Third District to all counsel of record listed below with their mailing addresses, by mailing said copies in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, Miami, Florida.

Lucia A. Dougherty, City Attorney
City of Miami Law Department
169 E. Flagler Street, #1101
Miami, Florida 33131; and

Thomas M. Pflaum, Esq.
Simon, Schindler, Hurst
& Sandberg
1492 South Miami Avenue
Miami, Florida 33130.

FELDMAN & LEVY, P.A.
Counsel for Petitioner

By: Donald Feldman
Donald Feldman